

STATE OF MICHIGAN
COURT OF APPEALS

ALAN F. ROBINSON and BARBARA A.
ROBINSON,

UNPUBLISHED
January 29, 2008

Plaintiffs-Appellants,

v

FRITZ BUILDERS, INC.,

No. 275033
Macomb Circuit Court
LC No. 2004-000602-CK

Defendant-Appellee.

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Plaintiffs challenge a circuit court order denying their motion to vacate or modify an arbitration award. Because plaintiffs have not established error in the arbitrator's award regarding damages or attorney fees, we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs hired defendant to build a home. After defendant completed construction, plaintiffs filed suit alleging claims for breach of contract, fraud, and violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* The crux of the claims was that defendant failed to construct the home according to grade elevations specified in the site plan. Specifically, the basement floor was approximately a foot below the high water level on the property and was subject to flooding. The case proceeded to arbitration. The arbitrator determined that defendant was liable to plaintiffs under each of the theories alleged. He awarded damages for breach of contract, determined that the measure of damages for fraud was the same, and did not expressly address damages for violation of the MCPA. Further, he rejected plaintiffs' claim for attorney fees. The trial court declined to vacate or modify the award.

Initially, we agree with defendant that the order appealed from is not a final order appealable by right. This Court has jurisdiction of an appeal by right from a final judgment or final order of the circuit court as defined in MCR 7.202(6). MCR 7.203(A)(1). A final judgment in a civil case includes "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order." MCR 7.202(6)(a)(i). A final judgment in a case that has proceeded to arbitration is the judgment giving effect to the award. 5 Longhofer, Michigan Court Rules Practice (4th ed), § 3602.11, p 97. Thus, plaintiffs do not have an appeal by right from any order with respect to the arbitration decision which is not a judgment on the award. *Id.*

However, considering that defendant did not file a motion to dismiss and that the issues have been fully briefed, we will treat the defective claim of appeal as an application for leave to appeal and grant it. See *Newton v Michigan State Police*, 263 Mich App 251, 259; 688 NW2d 94 (2004), overruled in part on other grounds by *Watts v Nevils*, 477 Mich 856; 720 NW2d 755 (2006).

A trial court's decision to enforce or vacate a statutory arbitration award is reviewed de novo on appeal. *Saveski v Tiseo Architects, Inc.*, 261 Mich App 553, 554; 682 NW2d 542 (2004); *Tokar v Alberty*, 258 Mich App 350, 352; 671 NW2d 139 (2003). The court may vacate an arbitration award if the arbitrator exceeded his powers. MCR 3.602(J)(1)(c). An arbitrator exceeds his powers whenever he acts beyond the material terms of the contract from which his authority is derived or in contravention of controlling principles of law. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996). Not just any error will justify vacating the award. *NuVision v Dunscombe*, 163 Mich App 674, 684; 415 NW2d 234 (1987). To be reviewable, the legal error must have been so material or substantial as to have governed the award, and but for which error, the award would have been substantially different. *Rembert v Ryan's Family Steak House, Inc.*, 235 Mich App 118, 164-165; 596 NW2d 208 (1999). In addition, the error must appear on the face of the award or in the reasons for the decision, which are substantially a part of the award. *Dohanyos, supra*; *Smith v Motorland Ins Co*, 135 Mich App 33, 40; 352 NW2d 335 (1984). The court cannot engage in contract interpretation, which is an issue for the arbitrator to determine, or review the arbitrator's factual findings. *Konal v Forlini*, 235 Mich App 69, 74-75; 596 NW2d 630 (1999). Nor may the court substitute its judgment for that of the arbitrator. *Gordon Sel-Way, Inc v Spence Bros, Inc.*, 438 Mich 488, 497; 475 NW2d 704 (1991).

Plaintiffs first claim that the arbitrator ignored controlling principles of law because he did not determine the proper amount of damages for fraud and a violation of the MCPA. First, the measure of damages for the various claims is the same. The measure of damages for breach of contract is the pecuniary value of the benefits plaintiffs would have received if the contract had not been breached. *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 54; 731 NW2d 94 (2006). The general measure of damages for fraud and violations of the MCPA is "the difference between the actual value of the property when the contract was made and the value that it would have possessed if the representations had been true." *Mayhall v A H Pond Co, Inc.*, 129 Mich App 178, 185-186; 341 NW2d 268 (1983). Thus, regardless of the claim on which liability was premised, the measure of plaintiffs' damages was the difference in the value of the house had it been built according to site plans and the value of the house as built.

Second, while a plaintiff may assert as many separate claims as he has, MCR 2.111(A)(2), only one recovery is allowed for a given injury. *Grace v Grace*, 253 Mich App 357, 368; 655 NW2d 595 (2002); *Chicilo v Marshall*, 185 Mich App 68, 70; 460 NW2d 231 (1990). In other words, the fact that defendant's conduct may give rise to more than one cause of action does not entitle plaintiffs to a separate award of damages for each when the causes of action seek to redress the same injury. *Id.* at 70-71. The breach of contract, fraud, and MCPA claims all sought recovery for the same injury, that being the construction of the basement below the grade elevation marked on the site plan such that the basement was susceptible to flooding. Having obtained an award for that injury under their breach of contract theory, plaintiffs were not entitled to a separate damage award for their fraud and MCPA claims.

Plaintiffs also claim that the arbitrator erred in failing to award them attorney fees, interest, and costs as permitted under the MCPA. The general rule is that attorney fees are not recoverable from the losing party as costs absent a statute or court rule expressly authorizing such an award. *Haliw v City of Sterling Hts*, 471 Mich 700, 707; 691 NW2d 753 (2005). The MCPA provides that a person who suffers a loss as a result of a violation of the act may bring an action to recover damages “together with reasonable attorneys’ fees.” MCL 445.911(2). However, the arbitration clause of the parties’ contract provided that “[e]ach party shall bear its own costs and fees unless the arbitrator awards otherwise.” Thus, the arbitrator was empowered, but not required, to award costs and fees.

Affirmed.

/s/ Richard A. Bandstra

/s/ Pat M. Donofrio

/s/ Deborah A. Servitto